

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 1, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-2617

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**LAWRENCE A. PAGENKOPF, a/k/a
LARRY PAGENKOPF, ASSIGNEE OF
THE FIRST NATIONAL BANK
OF STURGEON BAY,**

Plaintiff-Appellant,

v.

**DTL OF STURGEON BAY, INC.,
and DOOR COUNTY SALES, INC.,**

Defendants,

ROBERT A. SCHMIDT,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Door County:
DEE R. DYER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Lawrence Pagenkopf appeals part of a judgment awarding Robert Schmidt \$25,600, representing Schmidt's claimed losses in a cross-claim arising out of Pagenkopf's sale of a used car business to Schmidt. Following a bench trial, the court first found Schmidt liable to Pagenkopf in the sum of approximately \$99,000 plus interest, on Schmidt's personal guarantee and unlawful conversion of vehicles and fraudulent transfers from the business, DTL of Sturgeon Bay, Inc. The court then found in favor of Schmidt on his cross-claim asserting that Pagenkopf had initially induced Schmidt to buy the business with false representations about its financial history. Although Schmidt failed to prove compensatory damages,¹ the court nevertheless found that Schmidt was entitled to offset Pagenkopf's damages as "consequential damages" of Pagenkopf's misrepresentation. In addition, the court found that Schmidt was entitled to a setoff for assets that he transferred to DTL from his own car company, giving him a net judgment of \$25,600.

While we conclude that the trial court's finding that Pagenkopf misrepresented the financial condition of the business is not clearly erroneous, we reject the court's conclusion that Pagenkopf's damages were cancelled as the result of Schmidt's subsequent fraudulent conveyances and unlawful conversions of company assets. We also conclude that in awarding Schmidt a net credit for transfer of assets to DTL, the court failed to consider the value of other assets Schmidt acquired from DTL at or prior to dissolution. We therefore reverse that part of the judgment awarding damages to Schmidt and remand to allow the court to determine what, if any, net credit Schmidt should receive after the various transfers and acquisitions are considered.

¹ Schmidt, who appeared at the trial without counsel, has not cross-appealed the court's finding that he failed to present any evidence upon which to award compensatory damages for the tort of misrepresentation. The trial court noted that in cases of intentional misrepresentation, Wisconsin has adopted the "benefit of the bargain" rule, citing *Ollerman v. O'Rourke Co.*, 94 Wis.2d 17, 53, 288 N.W.2d 95, 112 (1980), and that these damages may be measured in two ways:

1. The difference between the value of the property as represented and its actual value as purchased.
2. The reasonable cost of placing the property received in the condition it was represented to be.

This appeal arises out of The First National Bank of Sturgeon Bay's action to foreclose and enforce the provisions of its used car floor plan agreement and general business security agreement between the bank and DTL, and to enforce Pagenkopf's personal guarantee to secure the loan. The bank amended its complaint to include Schmidt, who had purchased the DTL stock from Pagenkopf and others. Pagenkopf cross-claimed against Schmidt alleging various theories of liability, including a claim that Schmidt had unlawfully converted vehicles belonging to the corporation and had given Pagenkopf a personal guarantee. Schmidt in turn cross-claimed against Pagenkopf, alleging misrepresentation in the sale of DTL to Schmidt. Prior to the foreclosure, Schmidt had dissolved the corporation, and succeeded to its assets as the sole shareholder. After the bank foreclosed and sold the vehicles financed, it settled its substantial deficiency claim against Pagenkopf and assigned any claim against Schmidt to him. The bank is not a party to this appeal.

The evidence at trial demonstrated that Schmidt, who operated his own used car business, was having trouble obtaining bank credit to finance the purchase of vehicles. He initially approached Pagenkopf in early 1988 seeking to purchase DTL's used car floor plan financed by the bank. Pagenkopf was the majority shareholder, director and president of DTL, which he operated with two other shareholders. After examining the books, which showed that DTL had been losing money, Schmidt discussed the financial and management history of the business with Pagenkopf. According to Schmidt, Pagenkopf attributed the financial losses to "incompetent managing" by one of his partners, and represented that he had not been involved in the day-to-day operations of the business himself during the period of heavy losses. According to Schmidt, Pagenkopf also assured him that the bank financing plan would remain in place after the sale. At the time, the bank had Pagenkopf's personal guarantee to secure the loan. Schmidt purchased the shares of the other owners in order to obtain access to the financing plan between DTL and the bank obtained by virtue of Pagenkopf's personal guarantee. After only a few months, Schmidt gave his own personal guarantee to Pagenkopf to secure the floor plan financing, acquired Pagenkopf's shares of the company and effectively became sole owner and operator. When the bank's financing agreement expired, Pagenkopf declined to extend a personal guarantee for an extension plan, although he did sign a thirty-day extension of the floor plan. Upon the bank's discovery of violations of the security agreement, it refused to renew DTL's financing and commenced a foreclosure against DTL, Pagenkopf and Schmidt.

The court found that he was liable to Pagenkopf on his personal guarantee and for conversion of vehicles and for fraudulent transfers. Pagenkopf's damages were calculated at \$99,232.22 plus interest at 5% from October 31, 1989, to the present, and he was awarded costs and reasonable attorney fees for collection on the conversion claim. Schmidt did not appeal the court's decision. Pagenkopf appeals the court's finding that he misrepresented DTL's financial condition and thereby induced Schmidt to purchase the company, and appeals the court's determination of Schmidt's damages.

SUFFICIENCY OF EVIDENCE OF MISREPRESENTATION CLAIMS

Findings of fact shall not be set aside unless they are clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. Section 805.17(2), STATS. The trial court found that Pagenkopf represented that the business, DTL, was in better financial condition than it was in fact. The court found that Pagenkopf misrepresented the extent of losses DTL had incurred and that it was Pagenkopf and not his business partners who had "put the business in its dire financial condition" prior to Schmidt's purchase. The court, in its written decision, also found: "and this is the most serious misrepresentation made by Pagenkopf, that Pagenkopf personally guaranteed to Schmidt that the floor plan with the Bank would never be in jeopardy. That is, Pagenkopf assured Schmidt that the floor plan with the Bank would be continued."

Reviewing the promise of a guaranteed floor plan first, fraud must relate to a present or pre-existing fact, and it cannot ordinarily be predicated on unfulfilled promises or statements made as to future events. *Beers v. Atlas Assur. Co.*, 215 Wis. 165, 171, 253 N.W. 584, 587 (1934). The exception to this general rule applies "when promises are made ... and at the time of making them the promisor has a present intent not to perform them" *Anderson v. Tri-State Home Improve. Co.*, 268 Wis. 455, 463, 67 N.W.2d 853, 858 (1955). The weight of testimony and the credibility of witnesses are questions for the trial court, and where more than one reasonable inference may be drawn from the credible evidence, the reviewing court must accept the one drawn by the trier of fact. *Hanz Trucking, Inc. v. Harris Bros.*, 29 Wis.2d 254, 262, 138 N.W.2d 238, 242 (1965).

The trial court in essence found a present intent not to perform the promise when it was made, finding that "Pagenkopf acted on the first opportunity to pull the plug on Schmidt." The court also found that Pagenkopf knew the representation regarding the future of the floor plan was untrue. The court referred to the fact that almost immediately upon transfer of the DTL stock to Schmidt, Pagenkopf, who was "well respected at the Bank and had other resources at his disposal with which to attempt to satisfy the Bank and convince the Bank to continue the floor plan into the future." The court implicitly found that when Pagenkopf assured Schmidt that the bank financing would remain in place, he was representing that he would renew the guarantee that secured it, and made the representation with no present intent to do so.

Whether Pagenkopf intentionally led Schmidt to believe he would continue to provide a personal guarantee to the bank in the future so as to assure financing, and whether Pagenkopf had an intent not to perform such a promise, were questions of fact. The trial court and not this court weighs the credibility of witnesses and draws the appropriate conclusion from competing inferences. The court's findings in Schmidt's favor are not clearly erroneous. *See* § 805.17(2), STATS. Similarly, the court found that Pagenkopf misrepresented that earlier DTL losses were attributable to mismanagement by one of his partners, whose shares Schmidt originally purchased, and that the business had improved after Pagenkopf took over operations. There was evidence from witnesses to support the finding that Pagenkopf had in fact taken over much of the management as early as 1986 or early 1987 when substantial losses occurred.

We also reject Pagenkopf's argument of insufficient evidence of Schmidt's reliance on any misrepresentations, suggesting that prior losses were not important. In a claim for misrepresentation, the claimant must show only that he believed the representation and relied upon it; it is not necessary that the representation be of such a character as would influence a person of ordinary intelligence and prudence. *See Ohrmundt v. Spiegelhoff*, 175 Wis. 214, 184 N.W. 692 (1921); Wis J I—CIVIL 2401, 2402.

Pagenkopf suggests that Schmidt's testimony was incredible, pointing to his felony conviction and some inconsistencies in his testimony. We decline to hold that Schmidt's testimony was incredible as a matter of law.

CONSEQUENTIAL DAMAGES TO SCHMIDT

After noting that Schmidt had failed to establish compensatory damages, the court proceeded to award what it characterized as consequential damages. Pagenkopf concedes that the court may award consequential damages such as loss of profits, travel expenses and the like, provided they do not duplicate a recovery already gained. *See Gyldenvand v. Schroeder*, 90 Wis.2d 690, 698, 280 N.W.2d 235, 239 (1979). Recovery of consequential damages, however, must be proximately caused by the party charged, or be within the contemplation of the parties at the time of the misrepresentation. *Id.*

We conclude that as a matter of law the losses occasioned by Schmidt's own misconduct may not be used as a substitute for compensatory damages which he failed to prove. The court calculated Schmidt's consequential damages to be "any awards given to Pagenkopf on his claims for conversion, guarantee, and fraudulent transfer." Schmidt had the opportunity at trial to prove the loss of the benefit of the bargain attributable to any misrepresentation by Pagenkopf. He did not do so. Consequential damages are not recoverable if they are too remote, that is, not proximately caused by the tortfeasor. *See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES*, § 3.2 at 139 (1973). We conclude, as a matter of law, that losses to the seller occasioned by Schmidt's own misconduct were not caused by the seller so as to cancel the seller's losses.

Finally, Pagenkopf challenges the court's finding that Schmidt was entitled to a \$25,600 net credit for transfer of used cars between DTL and Schmidt's other used car business. Without recounting the evidence in detail, we agree with Pagenkopf's contention that the court did not appear to have considered other evidence that would tend to reduce Schmidt's right to credit. For example, the court did not address the evidence that Schmidt had failed to account for his \$15,000 note receivable from Schmidt to DTL, although Schmidt dissolved the corporation and succeeded to its remaining assets. There was also evidence of an inordinate increase in DTL's salaries, commissions and operating budget after Schmidt took over. We therefore remand the matter so that the court can determine what if any setoff against Pagenkopf's judgment Schmidt is entitled to receive as a net credit.

By the Court. – Affirmed in part; reversed in part and cause remanded. No costs on appeal.

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